IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 9 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUNNASING SAHADEVSING

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 9 of 1998

MR JM BUDDHBHATTI for Petitioner No. 1-2

THROUGH JAIL for Petitioner No. 1-2

Mr.H.L.Jani, learned A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 02/05/2003

C.A.V. JUDGEMENT

1. By judgment and order dated 18.12.97, the learned Addl.Sessions Judge, Surat convicted the appellants and sentenced them to suffer rigorous imprisonment for a

period of seven years and fine of Rs.1,000/- in default simple imprisonment for three months for the offence punishable under Sec. 395 of I.P.C. and also convicted the appellants and sentenced them to suffer rigorous imprisonment for a period of seven years and fine of Rs.1,000/- in default simple imprisonment for three months for the offence punishable under Sec. 397 of the I.P.C. Both the sentences were ordered to run concurrently. Both the appellants were given the benefit of set off.

2. It is the prosecution case that on 30.1.95 at about 13.15 hrs. four persons came with country-made revolvers in their hands in the bank and one out of them kept the country-made revolver on the neck of the complainant and asked for cash key. One person asked the cashier to open the locker and on his opening the locker, hit him with the back portion of country-made revolver due to which he started bleeding. After that one of the robbers brought one green colour bag and filled Rs.4,09,700/which were in the locker and Rs.48,986/which were in the cash counter and ran away. After that the complainant sent a person to inform the police. Kosamba police came immediately and started the investigation. On recording the complaint of the complainant, the police filed the complaint and seized the bag and one bomb like article which was on the sofa as per the panchanama and started the investigation. During the investigation, it came to the knowledge that both the appellants were involved in another offence and were in court custody and therefore they were arrested on 26.6.95 and taken in police remand. On identification parade being done, the bank employees identified both these appellants and muddammal articles tape with radio and cash Rs.5,000/were seized and at the end they were charged and chargesheet was filed before the Judicial Magistrate First Class, Mangrol for the offences under Secs. 395,397 of I.P.C. and sec. 25(1) a & b of Arms Act and Sec. 3,4,5 of Explosive Substances Act.

3. As the case was triable by the Sessions Court, the case was committed to the Sessions Court, Surat. After recording the depositions of various witnesses and after full fledged trial, the Sessions Court, Surat was pleased to convict both the appellants for the said offences and sentenced them as discussed above. Being dissatisfied with the said judgment and order, this appeal is filed under Sec. 374 (2) of the Criminal Procedure Code.

4. Learned advocate for the appellants submitted

that the robbery is not in dispute, however, the only question is the identity of the culprits, which according to the defence, is not established. The miscreants were unknown and that descriptions more particularly, physical features were not stated by any witness in their statement. Identification parade was held after accused were shown to the prosecution witnesses. Even their photos were published. They were taken to bank and shown to witnesses and thereafter identification parade was held. Test identification parade was held without taking necessary precautions or care. The dummies were not of similar height, body or structure to the persons put in parade. According to the prosecution, out of alleged robbery of Rs.4,58,686/-, only Rs.5,000/- was recovered from PW 7 and not from any of the accused. Even those currency notes were not bearing slips of bank and date was also different. The complainant in his deposition has stated that he has not even seen the faces of the miscreants. The independent witness by name Devanand Arjan, who was present in the bank at the time of alleged robbery was not examined nor his statement was recorded. There is no legal or oral evidence connecting the accused with the crime. In view of the aforesaid circumstances, the prosecution failed to prove its case by legal evidence and accused may kindly be acquitted.

5. In support of his submissions, learned advocate for the appellants has relied on the following decisions:

1. State of Gujarat V/s Mohanlal @ Munno Usmanbhai Chauhan reported in 1996(1) G.L.H. 919.
2. Shaikh Umar Ahmed Shaikh and another V/s State of Maharashtra reported in AIR 1998 S.C. 1922.
3. Motilal Gajarbhai Chasisiya V/s State of Gujarat reported in 1988(1) G.L.H. 264.

6. Against the aforesaid submissions, Mr.Jani learned A.P.P. for the State submitted that the accused were properly identified by the witnesses who has deposed in support of the prosecution case. There is no violation of rules and regulations while T.I. parade was held as alleged by the learned advocate for the appellants. The appellants-accused were never taken to the witnesses before the T.I.parade. On the contrary, the concerned witnesses have rightly identified the present appellants who came to loot the money from the bank. The loot took place on 30.1.95 and it was recess time. Therefore, there are all chances of identifying the appellants-accused. Learned A.P.P. for the State has relied on T.I.parade and submitted that the dummies were of similar height, body and structure. They were

brought by the police in covered faces at the time of T.I.Parade and therefore there is no chance of police to present before the witnesses before the T.I.parade was held.

7. In case of Mohanlal @ Munno Usmanbhai Chauhan (supra), the Dy.Mamlatdar did not ascertain the description of the accused so as to select almost similar dummies, description of the persons selected in the parade was also not mentioned in the panchanama. Panchas of the identification parade were not above the dominating effect of the Executive Magistrate and it came to the conclusion that the identification parade was not veracious and credible and it cannot be relied upon. In case of Shaikh Umar Ahmed Shaikh (supra), runs the submissions of learned A.P.P. for the State, the Apex Court considering the provisions of TADA, came to the conclusion that the conviction recorded by relying on identification of accused by said witnesses in court is not justified when accused were already shown to witnesses. Therefore, their identification in Court by said witness was meaningless and set aside the conviction. The facts of the aforesaid case are altogether different from the facts of the present case and cannot be relied upon by the learned advocate for the appellants and would not help the convicts-appellants.

8. Lastly, it was submitted by the learned A.P.P. for the State that there is no need for this court to discuss the findings of the trial court as looted money was belonging to the customers of nationalized bank. Therefore, strict view should be taken by not discussing the findings of the trial court.

9. I have perused the judgments cited by the learned advocate for the appellants and gone through the judgment and order of the trial court.

10. In case of Motilal Gajarbhai Chasisiya (supra), this Court has observed in para 3 as under :

> "So far as the identification parade is concerned, neither the substantive evidence nor the panchanama prepared at the time of the identification parade show that necessary care was taken at the time of identification parade. The names of the persons who were made to stand in a line along with the particular have been mentioned. If there is a wide difference between the ages of the persons who were made to stand in the line vis-a-vis the age of the suspect who is

to be identified, then it will be very easy for the person who has to identify the suspect by having a mere look at him."

11. I am of the opinion that this is a fit case wherein the conviction is required to be set aside by allowing the appeal of the petitioners as I find many infirmities in the T.I.parade as well as discrepancy in the deposition of the witnesses. For this purpose, it is required to go through the original T.I.parade in the Mamlatdar's chamber which is produced at exh. 28. On page 2 of exh. 28, the names of 14 persons are written with addresses but no description whatsoever nature of physique, structure or body of the persons/accused and therefore it is difficult to come to the conclusion that what were the height, body or structure, colour of skin etc. of the accused or dummies which were brought for the T.I.parade.

12. In case of Mohanlal @ Munno Usmanbhai Chauhan (supra), the Division Bench of this Court has observed in para 8 that "the Dy.Mamlatdar is bound to take care to select the dummies falling within the same age group. The persons having similar physique have also to be selected. The Dy.Mamlatdar did not ascertain the description of the respondent so as to select almost similar dummies. The dummies from the village of the respondent were not selected. It was held that the identification parade was not veracious and credible and it cannot be relied upon." It is stated further in para 8 considering the case of Motilal Gajarbhai Chasisiya (supra), that "while holding the identification parade, care should be taken to procure the dummies of nearly the same age, height and physique of the accused, so that the accused may not be wrongly identified, and involved with the crime.

13. I am aware that evidence of identification parade is not a substantive evidence, but its utility is for purposes of corroboration. In other words, it is utilized for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them. The real and substantive evidence of the identify of the accused comes when witnesses give statement in the Court, identifying the accused.

14. I have perused the chargesheet. Over and above the present two petitioners, the other three accused have been shown as absconding. One more aspect is that these two present petitioners were in custody and were first arrested on 26.6.95 as the alleged loot took place on

30.1.95.

15. To make inquiry regarding where the absconding accused and the looted muddammal, the petitioners were on police remand thrice. However, the police could not recover the alleged amount of loot except Rs.5,000/-.

16. It is also the story of the prosecution that the country made revolver was shown to the officer of the bank and one blow was also given to the prosecution witness by the rear part of the country-made revolver. However, police neither was able to recover any revolver or stick or any weapon from the place. P.W.No. 1 Dhansukhbhai Jethabhai Chauhan who was at the relevant time Manager of the bank has stated that he used to sit with the Assistant Manager. Three-four persons came with country-made revolver and key was asked and he was forced to lie down. The other three persons were also doing the same thing with cashier and other officers. After collecting the cash, all the persons ran away. The persons were unknown and they had a chance to see two persons. In clear terms the Manager has stated that there was only one customer in the bank but neither he was ordered to lie down nor injured by the looters. In cross-examination, he stated that there was no occasion to see the faces of the four looters. He has, for the first time, saw both the petitioners-accused on the day of the incident. All the witnesses had sufficient time to look at the looters. One person by name Devanand Arjan was in the bank as customer. It is unfortunate on the part of the prosecution that though the aforesaid person was present in the bank, he was neither examined by the prosecution nor his statement is recorded. Therefore, he could not be called at the time of I.D.parade. Devanand Arjan would be the necessary witness who would have thrown light over the fact regarding the structure of looters. He would have also thrown light about the correct description of the accused. Now when all the the witnesses stated that Devanand Arjan was in the bank as customer, his address must be there and the police could have tried to find him out and by not doing so, the investigation has missed the track.

17. One more aspect which goes against the prosecution is that there were slips of the bank such as R.B.I. bank of India on the currency notes which are looted, which fact has been negatived from the deposition of Shabbir Ismail Shaikh-P.W. 7. The amount of Rs.5,000/which was given by Pintukumar-accused who is absconding was as rent to p.w.7. The panch witness of

alleged muddammal currency notes Rustam Adullah Shaikh P.W. 12 also turned hostile.

18. While going through the deposition of the witnesses, I am of the opinion that the prosecution has failed to prove that the present petitioners were among the five persons who are alleged to have been in the gang that came for looting the bank. The I.D.parade is also not done properly and there were chances of independent witnesses who have seen the present petitioners, the fact that may not have come on record. The Mamlatdar office was on the first floor and the police station was on the ground floor. Moreover, as petitioners have stated in the last question in the statement of Sec. 313 of the Cr.P.C. that they are falsely implicated in this case as they were arrested in other case, there is reason to believe that to show that the police has arrested the looters of the bank, these petitioners are falsely implicated. It is a fact that no amount much less Rs.4,58,686/- were seized either from the petitioners or from any other place nor police recovered any weapon used in the alleged loot. Therefore, there are chances that petitioners have been falsely implicated after six months. In view of the aforesaid circumstances, I am of the opinion that the present appeal is required to be allowed and the present petitioners are required to be acquitted. Therefore, I pass the following order :

19. The appeal is allowed. The judgment and order dated 18.12.97 rendered by the learned Addl.Sessions Judge, Surat is hereby quashed and set aside. Both the appellants are acquitted and they be released forthwith, if they are not required in any other case. The amount of fine, if paid, shall be refunded. Rule is made absolute accordingly.

(SHARAD D DAVE, J)

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